

Mary C. Geddes
Assistant Federal Defender
FEDERAL PUBLIC DEFENDER
FOR THE DISTRICT OF ALASKA
601 West Fifth Avenue, Suite 800
Anchorage, Alaska 99501
(907) 646-3400

Attorney for Defendant

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHNNY LEE NAPIER,

Defendant.

Case No. 4:04-cr-0033-JWS

MOTION TO STAY THE COURT'S
ORDER MODIFYING CONDITIONS OF
RELEASE AND TO STAY THE
ENFORCEMENT OF CONDITIONS TWO
AND SIX, *Filed on Shortened Time*

The undersigned counsel, who is presently and actively representing Mr. Napier,¹ has just today received a Request for Modification of Conditions or Terms of Supervised Release, Mr. Napier's uncounseled assent, and this court's approval. Counsel had been unaware of any effort by the Probation Officer to obtain such modification.² Consequently counsel is seeking an immediate stay of this Court's order.

¹ The undersigned is seeking to contact Mr. Napier with respect to his case status, as she had been unaware that he had been released from the Bureau of Prisons.

² M.J. Haen is listed as Mr. Napier's counsel in the district court. Neither Ms. Haden nor Ms. Geddes were contacted by the Probation Office with respect to any proposed modification.

Because Mr. Napier's case has been recently reassigned from Judge Fitzgerald to Judge Sedwick, this court as well as the Probation Officer may not be aware that Mr. Napier has an appeal pending before the Ninth Circuit Court of Appeals, concerning the Order of Restitution in this case and Special Conditions Two and Six. Oral argument in this case took place before a Ninth Circuit panel on April 7, 2006.

More specifically, on appeal are:

- the court's legal authority to order restitution for *conduct other than that which was reflected in the single count of conviction*, i.e., any restitution in excess of \$50,000;
- in Special Condition 6, the court's legal authority to order Mr. Napier's participation in a mental health evaluation (specifying gambling or anger management issues), and if deemed advisable, participate in either or both inpatient or outpatient mental health treatment programs, *given (1) the condition was only imposed in the written judgment (but not the oral pronouncement) and outside the presence of the defendant*, and (2) where the special condition was not justified by the record; and
- in Special Condition 2, the court's legal authority to order Mr. Napier's participation in either inpatient or outpatient treatment programs for substance abuse treatment and **screening (testing)**, given that *(1) the condition was only imposed in the written judgment (but not the oral pronouncement) and outside the presence of the defendant*, and (2) where the special condition was not justified by the record.

On appeal, Mr. Napier did not contest the court's specific and express requirement of three drug tests, but he did object to the post-sentencing requirement of treatment and any additional screening.

The undersigned is well aware that Mr. Napier seeks to be compliant with his conditions of release; a pleasant man, he no doubt seeks to be cooperative with his supervising probation officer. **However, he is still represented by counsel and has chosen to exercise his appeal rights with respect to the above identified issues.** Therefore, the Probation Officer should

not engage in uncounseled discussions with Mr. Napier concerning the matters in litigation or seek uncounseled waivers.

Because these matters are presently before the Court of Appeals, this court is respectfully requested to stay the enforcement of this Order, pending the appellate court's decision. Frankly, given the panel's comments and questions at oral argument, counsel expects to receive a favorable decision in the not too distant future.

DATED this 18th day of May, 2006.

Respectfully submitted,

FEDERAL PUBLIC DEFENDER
FOR THE DISTRICT OF ALASKA

/s/ Mary C. Geddes
Assistant Federal Defender
Alaska Bar No. 8511157
601 West Fifth Avenue, Suite 800
Anchorage, AK 99501
Ph: (907) 646-3400
Fax: (907) 646-3480
mj_haden@fd.org

Certification:

I certify that on May 18, 2006, a copy of the foregoing document, with attachments, was served electronically on:

Stephen Cooper, Esq.

/s/ M. J. Haden